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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-10

UNIVERSITY OF TENNESSEE, et al.,

Petitioners,

v.

RITA SANDERS GEIER, et al.

No. 79-55

TENNESSEE HIGHER EDUCATION COMMISSION,

Petitioner,

v.

RITA SANDERS GEIER, et al.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Raymond Richardson, Jr., et al., plaintiffs-intervenors below, respectfully request that the petitions for writs of certiorari to review the opinion of the Sixth Circuit be denied.

QUESTIONS PRESENTED

1. Whether the courts below properly found that the State of Tennessee's maintenance of Tennessee State University as a predominantly black college in Nashville and the State's competitive development of the University of Tennessee at Nashville as a predominantly white public college perpetuated an unconstitutional state created dual system of public higher education?

2. Whether the remedial order of the courts below requiring the merger of Tennessee State University and the University of Tennessee at Nashville after a decade of trying to eliminate state imposed segregation by other means was an abuse of equitable discretion?

STATEMENT OF THE CASE

A. District Court Proceedings

This action was filed in 1968 by plaintiffs Rita Geier, et al., black students, parents, faculty and citizens to desegregate the public higher education system in the State of Tennessee. Subsequently, the United States and Raymond Richardson, Jr., et al., additional black students, parents, faculty and citizens, intervened on behalf of

plaintiffs. Defendants include the Governor of the State of Tennessee and the principal State instrumentalities responsible for the operation of public higher education, viz., the University of Tennessee, the Tennessee Higher Education Commission and the State Board of Regents. The principal issue has been the remedy required to eliminate the formerly statutorily required dual system perpetuated by the continued maintenance in the city of Nashville, the State capital, of Tennessee State University (TSU) as the State's historic public college for black persons, and the competitive development of formerly all white University of Tennessee at Nashville (UT-N) as a predominantly white institution alongside predominantly black TSU.

All Tennessee public colleges were formally racially segregated pursuant to State constitutional provision and law until at least 1960. Pet. App. 103a. TSU was established in 1912 and maintained as the exclusive public institution of higher education for black persons.[1/] The Uni-

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1/ To this day, Tennessee law provides that: "The function of the Tennessee State University at Nashville shall be to train negro students in agriculture, home economics, trades and industry, and to prepare teachers for the elementary and high schools for negroes in the state." Tenn. Code Ann. §49-3206 (1977).

versity of Tennessee, on the other hand, was founded and maintained as a college solely for white persons. UT-N was established in 1947 as a non-degree granting night extension school in Nashville solely for white students who were prohibited from attending nearby TSU. Pet. App. 103a-104a. In 1968, when the action was filed, TSU had an all black faculty and student body while UT-N remained essentially all white. Pet. App. 4a-5a.

Over the course of eleven years of litigation the district court repeatedly found that "the dual system of education created originally by law has not been effectively dismantled." Sanders v. Ellington, 288 F.Supp. 937, 940 (M.D. Tenn. 1968), Pet. App. 4a-5a; Geier v. Dunn, 337 F.Supp. 573, 576 (M.D.Tenn. 1972), Pet. App. 19a; Geier v. Blanton, 427 F.Supp. 644, 651-657 (M.D.Tenn.1977), Pet. App. 52a-66a. The district court initially declined to preliminarily enjoin the expansion of UT-N (then a small non-degree granting night school) in 1968 because "[t]here is nothing in the record to indicate that the University of Tennessee has any intention to make the Nashville Center a [competitive] degree-granting day institution," Pet. App. 7a. However, defendants were repeatedly ordered to develop a workable and effective plan of desegregation for the elimination of TSU's

status as an identifiable black institution, Pet. App. 9a-12a, 29a-32a, 41a-66a, 105a-114a. These orders went unheeded, and the State expanded UT-N into a degree-granting predominantly white institution with classes beginning in the late afternoon, while TSU stagnated and remained overwhelmingly black. Id. Finally, in 1977, the district court concluded that, "[t]he Court now finds that the existence and expansion of predominantly white UT-N alongside the traditionally black TSU have fostered competion for white students and thus have impeded the dismantling of the dual system", Pet. App. 54a. The court made specific findings that the two schools were competitive institutions offering duplicative courses, that UT-N's unrestrained growth prevented TSU from attracting white students, and that the State's various joint, cooperative and exclusive programs between the two schools had failed to result in substantial desegregation of the dual system in Nashville. Pet. App. 54a-66a, 105a-114a.

On the basis of 20 days of trial (and the unanimous opinion of all the expert witnesses for the parties), the court concluded that "at this time the only reasonable alternative is the merger of TSU and UT-N into a single institution," and ordered merger no later than July 1980 under the State Board of Regents, the defendant governing

board of TSU. Pet. App. 67a, 114a.[2/] The State Board of Regents filed a plan of merger which provides "a comprehensive framework for implementation of merger," including joint TSU-UT-N implementation committees and subcommittees, timetables, and full implementation of merger in July-August 1979. Pet. App. 116a-117a. The plan, which expressly provides that UT-N's continuing education and evening programs are to continue at its downtown campus as part of TSU, was accepted by the district court. Pet. App. 117a.

B. Court of Appeals Decision

Two of the State defendants, the University of Tennessee and the Tennessee Higher Education Commission, appealed. On April 13, 1979, a majority of the court of appeals, Judges Lively and Peck, affirmed in a lengthy and comprehensive

2/ Merger was sought by all the parties plaintiff and TSU. Pet. App. 64a, 110a, 112a. Merger was opposed by defendants University of Tennessee and Tennessee Higher Education Commission, although in 1972 the Commission had reported that "a merger of Tennessee State and U.T Nashville does not appear to be feasible at the present time, although this may be necessary at some time in the future to complete the desegregation process and to eliminate duplication and overlapping of programs." Pet. App. 66a, 110a.

opinion. Pet. App. 102a. Judge Engel concurred in the affirmance of the finding of a clear underlying constitutional violation arising from the State's failure to dismantle the dual system in Nashville, but dissented on the particular remedy ordered. Pet. App. 132a-134a. Judge Engel would have vacated the judgment and remanded for further proceedings specifically for "the entry of appropriate injunctive relief to confine UT-N to those courses and activities which were offered prior to the expansion in 1969" or "[s]hould UT-N not be satisfied with this, there remains available to it the opportunity to enter into [a voluntary merger] agreement with TSU such as that which is now in effect in Memphis between UT and Memphis State University." Pet. App. 142a-143a.

On July 1, 1979 TSU and UT-N were merged.[3/]

Petitions for certiorari have been filed by defendants University of Tennessee (No. 79-10) and Tennessee Higher Education Commission (No. 79-55). Neither defendant Governor nor defendant State Board of Regents have sought review.

3/ On June 18, 1979 the full Court denied applications for a stay of the merger filed by petitioners University and Higher Education Commission. Motions to stay the merger previously had been considered and denied twice by the district court and twice by the court of appeals.

ARGUMENT

1. The petitions request the Court to review evidence and discuss specific facts, see, United States v. Johnston, 268 U.S.220, 227(1925). Petitioner's argument with the courts below is that "the mere existence of a predominantly black institution of higher education" is insufficient proof of discrimination. UT Pet. 17, THEC Pet. 19. The court of appeals, however, specifically rejected this characterization of the factual record: "This is not an accurate statement of the district court's holding . . . It was the failure of the defendants to dismantle a statewide dual system, the 'heart' of which was an all-black TSU, which was found to be a continuing constitutional violation." Pet. App. 118a, see also, 133a-134a. The related factual claim that the University of Tennessee played no role in the maintenance of Tennessee State University as a predominantly black institution, UT Pet. 27, THEC Pet. 22, was also specifically rejected by the court of appeals because "[t]he district court found that acts of the UT Board in expanding the program and size of UT-N impede desegregation of TSU and thus the dismantling of Tennessee's dual system of public higher education." Pet. App. 128a.

These factual contentions which two courts below have rejected are neither meritorious nor appropriate for certiorari. See, e.g., Blau v. Lehman, 368 U.S. 403 (1962). With respect to violation, all four judges who considered the merits below found facts supporting a finding of constitutional violation. Two courts below found that the factual record required a merger remedy; the lone dissenter would have required either a more drastic remedy, i.e, stripping UT-N of all its post-1968 expansion programs and activities, or the same remedy, i.e., providing UT-N with the opportunity to voluntarily transfer its programs to TSU. Pet. App. 142a-143a.

2. The legal standards applied by the courts below are neither novel nor remarkable. The actions of State defendants in expanding UT-N as a white alternative to TSU in the Nashville area, and the ineffective efforts taken to eliminate the prior dual system imposed by law were measured against the affirmative duty of the State to provide for effective desegregation and to desist from impeding the desegregation process. Green v. County School Board, 391 U.S. 430 (1968); Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972). These basic principles of school desegregation law were just reaffirmed in Columbus

Board of Education v. Penick, ___ U.S.___, 47 USLW 4924, 4926-4927 (July 2, 1979), affirming, 583 F.2d 787 (6th Cir. 1978), and Dayton Board of Education v. Brinkman, ___ U.S.___, 47 USLW 4944, 4947 (July 2, 1979), affirming, 583 F.2d 243 (6th Cir. 1978).

Nor is there any authority for the claim that the sum total of the State's obligation to dismantle a dual system in the field of public higher education is merely to drop formal racial bars to admission. UT Pet. 21, THEC Pet. 12. Indeed, it has long been recognized that the affirmative duty to desegregate is as exacting in public higher education, but that the means of eliminating discrimination are necessarily different when dealing with different levels of education. Norris v. State Council of Higher Education for Virginia, 327 F.Supp. 1318 (E.D. Va.), aff'd per curiam sub nom Board of Visitors of the College of William & Mary in Virginia v. Norris, 404 U.S. 907 (1971); Alabama State Teachers Assoc. v. Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969). Compare Pet. App. 118a-123a. That the long settled principle of the affirmative duty to dismantle a dual system of public education is applied in this case to higher education does not in itself raise substantial questions. Id.

Certainly, the clear factual record in this case of purposeful state action that inevitably impeded the process of desegregation, in which all four judges below concurred, does not press the limits of any doctrine of liability.

3. The remedy of merger was ordered by the district court only after nearly a decade of litigation and repeated submission of unworkable desegregation plans by defendants. There was no abuse of equitable discretion under the facts in this case. Milliken v. Bradley, 433 U.S. 267, 280-282 (1977).[4/] Nor is the merger remedy unique or unpre-

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4/ The court of appeals held that:

> "The scope of the district court's equitable power is broad enough to encompass a merger order under the facts of this case. The court's experience taught that the only meaningful results were obtained when it ordered the graduate program in education transferred exclusively to TSU. A merger of the two institutions will involve the district court in their day-to-day affairs to a much less pervasive degree than any attempt by it to divide and allocate all the various programs to one school or the other. Merger also intrudes less into the freedom of students to attend a college of their choice than any plan which might require compulsory assignments to bring about a dismantling of the dual system. The acknowledged differences between higher education and education at the primary and secondary levels appear to

(contd.)

cedented. As both the district court and court of appeals found, the competition between preexisting Memphis State University, a predominantly white sister school of TSU, and an expanding University of Tennessee facility in another Tennessee city, Memphis, was resolved by merger of the two institutions under Memphis State. Pet. App. 56a-58a, 126a, see also 142a-143a.5/

There simply is no warrant to unravel a remedy that has provided Nashville, Tennessee for the first time with equal educational opportunity in public higher education.

4/ (cont'd)
make such frequently used remedies as assignment and transportation of students to a particular institution unworkable as well as undesirable."

Pet. App. 125a-126a.

5/ Guidelines of the U.S. Department of Health, Education and Welfare promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C §2000d, specifically approve "merging institutions or branches thereof, particularly where institutions or campuses have the same or overlapping service areas" as a desegregation device in public higher education. Revised Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658, 6661 (February 15, 1978).

CONCLUSION

The petitions for writs of certiorari filed by the University of Tennessee and the Tennessee Higher Education Commission should be denied.

Respectfully submitted.

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